IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 4-2-2005

CORAM

THE HON'BLE MR.JUSTICE T.V.MASILAMANI

S.A.NO.161 of 1994

1. Uthamaraj
   S/o of Nallathooran
2. Kamala
   W/o Uthamaraj .. Appellants/Defendants 1 & 2

versus

1. Ganesan
   s/o Nallathooran
2. Meenakshi Ammal
   W/o Nallathorran
3. Muthayyan
   S/o Nallathooran
4. Punyamoorthy
   S/o Nallathooran .. Respondents/Plaintiff and Defendants 3 to 5

Second Appeal against the judgment and decree passed by the Subordinate Judge, Arni in A.S.No.71 of 1992 dated 29.9.1993 against the judgment and decree of the District Munsif, Cheyyar dated 28.8.1992 in O.S.No.194 of 1982.

For Appellants : Mr.N.Vanchinathan

For Respondents: N.A.

J U D G M E N T

The appellants/defendants 1 & 2 who failed before both the courts below have preferred this appeal.

2. The 1st respondent/plaintiff filed the suit for partition and separate possession of 1/5th share in the 'A' schedule and 'B' schedule properties. The appellants have resisted the suit on the basis that there had been an oral partition in the family and separate items had been allotted to the parties except in respect of items 2, 8 and 9 in the 'A' schedule property.

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3. In the above circumstances, the learned District Munsif, who tried the suit on the basis of the recorded evidence both oral and documentary and upon hearing the arguments advanced on either side, granted a preliminary decree for partition of 1/5th share in the suit properties as prayed for.

5. Aggrieved by the judgment and decree of the trial court, the appellants herein preferred an appeal before the Subordinate Judge, Arani. The learned Subordinate Judge, having analysed the evidence on record, in the light of the judgment and decree passed by the trial court, dismissed the appeal. Hence, this Second Appeal.

5. The parties to the appeal are hereinafter referred to as they were arrayed before the trial court for the sake of convenience.

6. The contentions of the 1st respondent/plaintiff in the plaint are briefly as follows:-

(a) The plaintiff submits that the 1st defendant is the eldest brother and defendants 4 and 5 are the other brothers. The 2nd defendant is the wife of the 1st defendant. The 3rd defendant is the mother of plaintiff and defendants 1, 4 and 5. The plaintiff's father died about 25 years back leaving the plaintiff, defendants 1, 3 to 5 along with two daughters as his legal heirs.

(b) The 1st defendant is having control over the income from the lands. The plaintiff is now employed at Vandavasi. The 1st defendant had purchased 'B' schedule properties from out of the funds of the joint family benami in the name of his wife, the 2nd defendant. The 2nd defendant had no independent source of income to acquire the properties under the registered sale deed dated 24.11.1965. The plaintiff and defendants 1, and 3 to 5 each are entitled to 1/5th share in the suit properties. The joint family is having two electric pump sets. The 1st defendant has removed an electric pump set from the S.C.No.36 belonging to the joint family.

(c) The 1st defendant is now attempting to segregate the joint family funds and he is not attending to the needs of the joint family members. As the other brothers of the plaintiff could not join this plaintiff, he filed the suit for partition and and separate possession of 1/5th share and for mesne profits from the 1st defendant. No reliefs are prayed for against the defendants 3 to 5.

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(d) On 24.11.1966 the 1st defendant purchased 'B' schedule properties benami in the name of 2nd defendant for the benefit of the joint family and about one year back, the 1st defendant had illegally removed the electric pump set from 'A' schedule properties.

8. The averments in the written statement filed by the 2nd appellant/2nd defendant are briefly as follows:-

(a) The 2nd defendant denied that 'B' schedule properties were purchased from out of the proceeds from the family properties, that this defendant has no means to purchase 'B' schedule properties and that the said properties were purchased for the benefit of the joint family.

(b) The first item of 'B' schedule was purchased from out of her own money by a sale deed dated 24.11.1965 and this defendant dug the well in the third item of 'B' schedule by borrowing loans from others. This defendant purchased the motor shown as item No.2 of the schedule for a sum of Rs.1,875/- on 21.12.1977 from Kancheepuram Shanthi Electricals for which she has filed the bills and receipts for payment of advance amount.

(c) She had obtained service connection No.152 in her name and paid electric consumption charges in her own name every month. She has been in possession and enjoyment of the first item of 'B' schedule property right from 1965 in her own right.

(d) There was a partition among the plaintiff, defendants 1, 4 and 5 in 1962 and all the family properties were partitioned among themselves and they are separately cultivating their respective shares by paying kist therefor. Item Nos.2, 8 and 9 which could not be partitioned and the same are in their joint possession and enjoyment. The 5th item of 'A' schedule property does not belong to the family. After partition, plaintiff and defendants 4 and 5 have sold away 18-1/2 cents out of 37 cents in S.No.394 by a registered sale deed dated 16.8.1979 to third party.

9. On the above pleadings, the trial court framed the following issues:-

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(i) Whether the suit properties have already been divided between the Plaintiff and D1, D4, D5 except items 2, 8 and 9 of 'A' schedule properties during 1962?

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(ii) Whether the plaintiff, D4, D5 are estopped to deny the partition, they having alienated the properties which fell to their share?

(iii) Whether the properties mentioned in the 'B' Schedule belong to the 2nd defendant?

(iv) Whether the 2nd defendant has perfected her title to the 'B' schedule properties by adverse possession?

(v) Whether the defendant 2 and 3 are liable for mesne profits?

(vi) Whether the defendants 1 and 2 took away the motor pump set stealthily?

(vii) Whether the plaintiff is entitled to partition in all the suit properties except the items 2, 8 and 9 of 'A' schedule?

(viii) Whether the plaintiff has got any relief against the defendants?

(ix) Whether the plaintiff has valued the suit properly for court fee and jurisdiction?

(x) Whether the defendants 1 and 2 are entitled to compensatory costs under section 35A C.P.C. from the plaintiff?

(xi) To whom does item No.5 of 'A' schedule property belong?

(xii) To what relief, if any, is the plaintiff entitled?

10. On considering the recorded evidence and the arguments of either side, the trial court rendered its findings on the above issues as briefly stated hereunder:-

On issue Nos.1, 2 & 3, it was held that the suit properties except items 8 and 9 were not divided with reference to good and bad soil among the parties by metes and bounds, that the plaintiff and defendants 4 and 5 are not therefore estopped to deny the earlier partition, though they have alienated some of the properties jointly, and that 'D' schedule property did not belong to the 2nd defendant. In view of the findings on issue Nos.1 to 3, the

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trial court found on the consequent issue Nos.4 to 6 in favour of the plaintiff. Issue No.9 was not pressed by both sides. Similarly, issue Nos.10 and 11 were answered in the negative and ultimately, on issue Nos.7 and 12, the trial court held that the plaintiff is entitled to 1/5th share in the suit properties as prayed for and decreed the suit accordingly for passing a preliminary decree for partition.

11. Aggrieved by the judgment and decree passed by the trial court, the defendants 1 and 2 preferred the appeal in A.S.No.71 of 1992 before the Subordinate Judge, Arni. The learned Subordinate Judge on the basis of records and other materials available, framed the following points for consideration:-

(1) Whether the appeal has to be allowed as prayed for?

(2) What relief the appellant is entitled to?

12. After careful analysis of the recorded evidence and upon hearing the arguments of both sides, the learned Subordinate Judge concurred with the findings rendered by the trial court and dismissed the appeal.

13. In the above circumstances, the following substantial question of law was formulated for consideration:-

> "Whether the Courts below failed to consider that the plea of benami is not open to the first respondent under the provisions of Act 45 of 1988?

14. Heard Mr.N.Vanchinathan, the counsel for the appellants. Though the respondents' names have been printed in the cause list, they neither appeared in person nor represented through counsel.

15. The learned counsel for the appellants/defendants 1 and 2 has argued that the courts below ought to have held on the basis of the recorded evidence that there was an oral partition among the parties in or about 1962 whereby the properties described under Schedule 'A' to 'D' had been allotted as narrated above. Similarly he has contended that the courts below failed to consider the legal importance of the document, Ex.B-1 dated 16.8.1979 under which one item of properties allotted to respondents 1 to 4 herein under the said oral partition in 1962 had been sold to one Kathan and therefore the recitals in Ex.B-1 ,பிதுரார்ஜிதமாய் கிடைத்து எங்கள் அனுபவத்தில் இருந்து வரும் சொத்து clinch the issue in favour of the appellants. Further he has contended that the purchaser and the scribe of the said document had also given evidence to establish

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that the vendors have been enjoying the properties as per the oral partition. He has also pointed out that the 1st appellant has signed in the said document as an attesting witness and therefore, the necessary inference from the evidence on record would be that the properties had already been divided among the members of the family.

16. Hence, it is argued that the courts below ought to have accepted the case of the second appellant that the 'B' schedule properties had been purchased by the second appellant out of the funds provided by her parents and that she has been paying electricity charges etc. in her own right in respect of the said property. In the above circumstances, he has contended that the appeal has to be allowed by setting aside the judgments and decrees passed by the courts below.

17. It is not in dispute that the partition alleged by the appellants had not been supported by a registered document. According to the appellants, in or about 1962, the parties entered into an oral partition whereby 'A' schedule properties belonging to the joint family were divided and item No.1 of 'B' schedule property belonged to the second appellant as her absolute property by virtue of the sale deed under Ex.B-2 dated 24.11.1965.

18. On the contrary, the evidence on record, in my opinion is not sufficient to prove complete partition by metes and bounds regarding 'A' schedule properties. Reliance is placed on Ex.B-1 to show that unless there had been a partition of 'A' schedule, the respondents 1 to 4 would not have executed the sale deed in favour of one Kathan in respect of a piece of land dealt with in the said document.

19. Therefore, this Court is of the considered view that if really there had been an oral partition among the members of the joint family, as alleged, there was no need to execute the sale deed under Ex.B-1 dated 16.8.1979 by the respondents 1 to 4 and attested by the first appellant. Similarly the recitals "……பிதுராா் ஜிதமாய் கிடைத்து எங்கள் அனுபவத்தில் இருந்து வரும் சொத்து" would unmistakably indicate that the executants of the said document, namely, respondents 1 to 4 were in possession and enjoyment of the lands sold thereunder as their undivided joint family property and therefore, I am of the opinion that Ex.B-1 does not lend credence to the contentions put forth by the learned counsel for the appellants. In this view of the matter, I am inclined to uphold the concurrent finding rendered by both the Courts below that the appellants have miserably failed to prove the oral partition in so far as the 'A' schedule properties are concerned by adducing acceptable evidence. Hence, this Court is of the considered view that the partition

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relating to 'A' schedule properties as claimed by the appellants has not been proved.

20. In so far as the 'B' schedule properties are concerned, it is not disputed that the sale deed under Ex.B-2 dated 24.11.1965 had been executed in favour of the 2nd appellant. Exs.B-3 to B-13 have been produced to show that the 2nd appellant had been dealing with the 'B' schedule property as her separate property right from the date of purchase under Ex.B-2. The evidence on record had not been rightly appreciated by both the courts below and they have arrived at a wrong conclusion that the burden of proof cast upon the 2nd appellant had not been discharged by adducing satisfactory evidence.

21. But, on the other hand, the learned counsel for the appellants has drawn the attention of this Court to the decision reported in VALLIAMMAL (D) by L/Rs. vs. SUBRAMANIAM (2005-1-L.W.75) in support of his argument that the contention put forth by the contesting parties to the suit that item No.1 of 'B' schedule property had been purchased under Ex.B-2, benami in the name of the 2nd appellant for the benefit of the family has not been established for the simple reason that the legal presumption is that a person who purchases the property is the owner of the same.

22. Hence, he has rightly argued in the light of the ratio laid down by the Supreme Court in the decision referred supra to fortify the contention that the circumstances to determine the nature of the transaction as benami had not been proved by the 1st respondent. The circumstances to prove a benami transaction are as under:-

> "(1) the source from which the purchase money came;
>
> (2) the nature and possession of the property, after the purchase;
>
> (3) motive, if any, for giving the transaction a benami colour;
>
> (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;
>
> (5) the custody of the title deeds after the sale; and

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(6) the conduct of the parties concerned in dealing with the property after the sale."

Thus, the decision of the Supreme Court referred to above enumerates the criteria to decide the benami nature of the transaction.

23. On a careful scrutiny of the evidence on record, this Court finds that there is no material to show that the 1st respondent has established the aforesaid six circumstances to support the contention that the 'B' schedule properties had been purchased in the name of the 2nd appellant benami for the benefit of the family. In view of the recorded evidence, it is beyond doubt that the 2nd appellant has proved that she is the absolute owner of the said properties for the simple reason that she has produced the documents, Exs.B-2 to B-13 to show her possession of the property in her own right. The oral evidence of D.Ws.1 to 5 is totally in favour of her contention that 'B' schedule properties had been purchased out of the funds provided by her parents.

24. Section 4 of the Benami Transactions (Prohibition) Act, 1988 reads as under:-

"4. Prohibition of the right to recover property held *benami*:-

(1) No suit, claim or action to enforce any right in respect of any property held *benami* against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held *benami*, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply,

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of

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another person for whom he is a trustee or towards whom he stands in such capacity."

25. Though the first respondent/plaintiff is entitled to plead that 'B' schedule properties had been purchased in the name of the second appellant/second defendant *benami* for the benefit of the family on the basis of the recorded evidence, it has been held above that 'B' schedule properties had been purchased by the second defendant out of the funds provided by her parents and that she was in possession and enjoyment of the same in her own right and therefore this Court is of the considered view that on the factual aspect of the matter, the plaintiff has miserably failed to prove such plea of *benami* (vide) Section 4(3) of Act 45 of 1988 referred to above.

26. For the reasons stated above, this Court is of the considered view that the findings rendered by both the courts below regarding 'B' schedule properties are not in consonance with the recorded evidence. Hence, the appeal in so far as the 'B' schedule properties are concerned has to be allowed and in other respects, the same is liable to be dismissed.

27. In fine, this Second Appeal is partly allowed. The judgments and decrees rendered by both the courts below are set aside in so far as 'B' schedule properties are concerned and in other respects, the same are sustained. The parties are directed to bear their respective costs.

4-2-2005

rg/dpp

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Subordinate Judge, Arni (with records)
2. The District Munsif, Cheyyar (-do-)
3. The Section Officer, V.R.Section, High Court, Madras.

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